United States Court of Appeals

for the Second Circuit

APPELLEE BRIEF ON REHEARING EN BANC

ORIGINAL 76-7631

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FOR THE SECOND CIRCUIT

ORECK CORPORATION,

Plaintiff-Appellee,

—v.—

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE ON REHEARING *EN BANC*

LAW FIRM OF MALCOLM A. HOFFMANN
Attorneys for Plaintiff-Appellee
Oreck Corporation
12 East 41st Street
New York, New York 10017
(212) 685-0535

MALCOLM A. HOFFMANN
EDWARD A. WOOLLEY
ROBERT W. BIGGAR
ROBERT C. AGEE
BERNARD ZUCKER
CRAIG SCHILLER
Of Counsel

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Summary of Argument and of the Issues Presented for Review

The jury found a conspiracy in which defendants Whirlpool and Sears participated to bring about the illegal termination of Oreck on December 31, 1971 in violation of Section 1 of the Sherman Act. The verdict found strong support in the evidence as summarized in the Counter-Statement of the Facts (pp. 5-18). Whirlpool, a supplier of vacuum cleaners, conspired with Sears, a mail order house and retailer competing with the plaintiff, Oreck. Sears purchased most of Whirlpool's manufactured products, marketing them under the name "Kenmore." Oreck entered the

mail order business in 1967 and 1968; theretofore, it sold machines primarily through retail outlets. Because of this, a number of severe restraints were imposed on it to lessen its competitive threat to Sears. As Oreck sales increased and Oreck offered price competition closer to the Sears level, Oreck's distributorship was terminated by Whirlpool, notwithstanding that in 1971, the last year of the distributorship, Oreck sales actually surpassed Sears in volume (pp. 5-12, 16-17).

Restraints imposed upon Oreck's competition with Sears included the total exclusion of Oreck's sales from Canada (pp. 13-14), and a refusal by Whirlpool to make vacuum cleaners for private label customers because Sears was "not interested in having another competitor in the vacuum cleaner business" (pp. 15-16). Oreck was told not to "rock the boat" and to terminate its mail order business because Sears did not like it (p. 10), and Whirlpool declined to design a mailing package which would have dramatically increased Oreck's sales (pp. 11-12).

Whirlpool lost at least $1 million by refusing to sell to Oreck (pp. 16-17) and this, together with other evidence of irrational business behavior, also tends to support the inference of a conspiracy to boycott Oreck. Cases relied upon by defendants and the majority of the panel turn on the distinction between a unilateral substitution of exclusive distributors and conspiratorial termination of existing competition. These differences are real and involve both purpose and effect (pp. 19-24). The Supreme Court has held that such exclusion resulting from concerted action is *per se* illegal and constitutes a hard-core or "naked" restraint for which justification will not be heard (pp. 24-33). Inquiry into effect on the market, therefore, becomes irrelevant (pp. 36-38).

The majority of the panel also mistakenly thought that there had to be more than one "horizontal" competitor. We show that this has never been the doctrine and that in the leading case of *Klor's Inc.* v. *Broadway-Hale Stores Inc.*, 359 U.S. 207, 79 S. Ct. 705 (1959), the latter was a single competitive store located next door to Klor's which succeeded in causing Klors' suppliers to cut it off from certain electrical products. The evil is not horizontal but lies in the cut-off of supplies, which necessarily involves a vertical conspiracy (pp. 26-29).

The boycott cases also show that no "public injury" and no adverse effect in a general market need be demonstrated. This Court should reaffirm these time-honored doctrines which, with only the instant exception, have been consistently applied in this Circuit (pp. 30-31, 36-38).

Nothing turns on whether, as argued by defendants, the Oreck prices were cut below the Sears price. It was enough that competition between the two existed. Reliance upon *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, —— U.S. —— 97 S. Ct. 2459 (1977), is mistaken. This was a vertical-line case in which franchised exclusive locations were given to distributors. Although the Supreme Court in *GTE Sylvania* overruled *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967), to the extent that the earlier decision had outlawed exclusive territory as a *per se* violation, the case is in no way applicable to the facts at bar (pp. 33-36).

There was assent by the defendants to the trial court's jury instructions so reversible error may not be predicated upon them (pp. 39-41). The damage award of the jury should be sustained because it is fully supported by the proof, as Judge Mansfield noted in his dissent (563 F.2d at 66 n.4, slip op. at 6075 n.4) (pp. 42-43).

Statement of the Case

On December 15, 1977 this Court ordered a rehearing *en banc*. Plaintiff's petition for this relief was addressed to the majority opinion of Judges Robert P. Anderson and Charles L. Brieant, Jr., entered September 21, 1977 over the vigorous dissent of Judge Walter R. Mansfield (563 F.2d 54, slip op. at 6050-75). The majority ordered reversal of a judgment entered on July 13, 1976 by Judge Richard Owen of the United States District Court for the Southern District of New York. Among other things, Judge Mansfield stated, "The [majority] decision departs from basic principles established in numerous decisions of the Supreme Court. It will have mischievous results, . . . It weakens the private enforcement of the antitrust laws, upon which the Executive Branch heavily depends" (563 F.2d at 66, slip op. at 6075).

The judgment below was based upon a jury verdict of $2,250,000 (after automatic trebling) returned on July 8, 1976 after a 16-day trial generating 1,883 pages of trial transcript and 116 trial exhibits. The jury found that defendants conspired to eliminate Oreck Corporation ("Oreck") as a competitor of defendant Sears, Roebuck and Co. ("Sears") in the distribution of vacuum cleaners, attachments and parts manufactured by defendant Whirlpool Corporation ("Whirlpool") in violation of Section 1 of the Sherman Act (15 U.S.C. §1).*

Defendants' Joint Brief on Rehearing *En Banc* nowhere even acknowledges the *ratio decidendi* of the majority

* This was the only claim submitted to the jury, the trial court having dismissed Robinson-Patman claims (A 16-18) in face of Oreck's offer of proof (Tr. 1371-72). All other claims were withdrawn by Oreck's counsel before or during the trial.

decision. That was reliance upon authority controlling where the facts show lawful unilateral termination of an existing distributor. Both the majority and defendants assume an innocent state of facts here under which a trader may lawfully choose its customers. They ignore the cases addressed to the antitrust consequences of illegal concerted acts designed to eliminate the competition of an existing distributor.

Counter-Statement of the Facts

After negotiations between David Oreck and Jack Sparks, Vice President of Whirlpool, Oreck was incorporated in 1963 for the purpose of creating and operating a nationwide distributorship for Whirlpool-brand vacuum cleaners (A 56-58, 467-71; PX 3, E1-9). From 1957 to 1961 Mr. Oreck, as Executive Vice President of Bruno New York, had headed its sales operations, far the most successful among the many distributors of Whirlpool-brand vacuum cleaners (A 50-52, 55, 57, 466-67; Tr. 502-03, 652-56).

Whirlpool is one of the nation's largest manufacturers of electrical household appliances and an important manufacturer of vacuum cleaners. Sears is the nation's largest mail-order distributor of electrical household appliances and numerous other product lines. Sears also operates "some 2800 stores and sales offices selling vacuums" (Sears' Anss. to Interrogs. 1-C and 2 of Jan. 31, 1973).

(1) The Intimate Relationship Between Whirlpool and Sears

The jury's findings of conspiracy and restraint were made in the context of an intimate working relationship between Sears and Whirlpool which began in 1925, when Sears acquired a substantial block of common stock in the

corporate predecessor of Whirlpool (A 323), and when the parties entered into a "gentlemen's agreement." Under the "gentlemen's agreement" Sears, for over half a century, purchased approximately two-thirds of Whirlpool's total annual production of electrical household appliances (A 340-42). Between 1925 and 1976 Sears placed a series of officers and directors on the board of Whirlpool, and senior officers of Sears frequently became high Whirlpool officers (A 333-36). And by 1960 Sears had become the largest owner of Whirlpool's common stock (A 323).

Between August 7, 1963 and December 31, 1971 Oreck acted as the exclusive distributor for Whirlpool-brand vacuum cleaners in the United States, competing with Whirlpool-made vacuum cleaners sold by Sears under the trade name "Kenmore." Over the years Oreck's competition with Sears in vacuum cleaners became both increasingly intense and increasingly intolerable to Sears, and thus in 1971 Sears eliminated Oreck as its direct competitor with the conspiratorial cooperation of its supplier Whirlpool.

The jury had before it ample facts of record supporting its conclusion that Sears and Whirlpool conspired to restrain Oreck's competition with Sears in terms of prices, private label sales and Canadian sales. Whirlpool imposed these widespread restraints on Oreck's competition at various times from 1963 through 1971 even though the original Oreck-Whirlpool distribution agreement of 1963 imposed upon Oreck the sole limitation that it not solicit sales through "house-to-house canvassing" (PX 3, E2, par. 3). However, the 1963 distribution agreement on its face showed clearly that Sears was to be favored heavily over Oreck. In addition to specifying the usual categories of

uncontrollable events such as strikes and acts of God, the *force majeure* clause excused any Whirlpool failures to fill Oreck's vacuum cleaner orders due to "the demands of other Whirlpool customers" (PX 3, E5, par. 7), meaning "demands" from Sears, Whirlpool's only other vacuum cleaner customer (A 72, 175, 207, 262-63, 508, 638).

Sears had annual meetings with Whirlpool at the highest corporate and sales levels concerning Whirlpool's annual production. During a 1971 meeting between Mr. Button, Sears' Executive Vice President for Sales and Mr. Upton, Whirlpool's Group Vice President (A 571-73) "who had overall responsibility" for Whirlpool's relationship with Sears (A 883-84), these high officers reviewed Whirlpool's entire line of merchandise and were "updated on their history and their plans for the future" (A 572), including "plans" for vacuum cleaners to become effective after the December 31, 1971 termination of Oreck (A 572, 574).

(2) Restraints on Oreck's Price Competition With Sears in General and in Mail Order

Instead of meeting the issues raised by the majority opinion, defendants confine their joint brief largely to discussion of one minor aspect of the dissenting opinion of Judge Mansfield—his supposedly erroneous conclusion "that Oreck was terminated to discipline it for price cutting and therefore a *per se* violation had been shown" (Brief, p. 2). Defendants would take price competition out of the case by a demonstration that Sears sold at prices lower than Oreck and by their claim that the dissent's references to Sears' "higher prices" lack any support in the record (Brief, p. 9). But if Sears sought to escape price competition, it made no difference if the Oreck prices were higher or lower than Sears. The "price

cutting" was from Oreck higher to Oreck lower prices, and the lower the Oreck price the more Sears felt the competitive bite.

Defendants' claim of absence of price competition, however, finds no support whatsoever either in Judge Mansfield's dissenting opinion or the record. The facts of record show that Whirlpool advised David Oreck at the very outset "that I was not to conflict with Sears on low price points" and "that I was simply not to conflict with Sears Roebuck on price, appearance, anything like that" (A 75). They also show that Whirlpool's concern about maintaining the high retail prices favored by Sears was a concern even before Oreck was appointed as exclusive distributor in 1963. As early as October 16, 1961, Whirlpool had formulated the objective of shielding Sears from price competition (PX 160, E141):

> Sears becomes very unhappy if RCA WHIRLPOOL product is retailed for less than the Sears product manufactured by Whirlpool. For this reason, we understand it has been decided that the RCA WHIRLPOOL brand should have retail prices that are comparable to Sears.
>
> Our challenges then . . . "Can we sell cleaners in volume at high retail prices . . . and if so, how?"

The record makes it very clear that Whirlpool intended to force Oreck to adhere to that objective some two years later when it entered into the 1963 distribution agreement with Oreck. In 1966 Whirlpool's President John H. Platts complained to its Vice President Jack Sparks that one of Whirlpool's "main points of interest" in Oreck's program was a method of distribution "that could sell a higher priced 'ticket item' a la Electrolux" but this objective had "virtually disappeared," citing the fact that Whirlpool's

billing price to Oreck was "almost $5.00 less than our average billing price to Sears". Platts concluded that "we must maintain our perspective as regards why we were originally interested in this venture—what 20,000 [Oreck] units does or doesn't do for us compared to 550,000 for Sears" (PX 45, E39-40).

Mr. Sparks testified that in 1963 a price range of $89 to $139 or $149 was forecast for Oreck (Tr. 658) and that "it certainly wasn't intended to include lower priced vacuum cleaners. We've been down that road before" (Tr. 687), meaning in "the previous distribution" from 1957 to 1961 (Tr. 683). He also testified that in 1963 "the original purpose did not include mail order sales" (Tr. 697). Deposition testimony by John Payne, Whirlpool's Product Manager in charge of the Oreck account (A 105, 577, 857-58; Tr. 1529) which was read into evidence included his testimony that Oreck's "early products were very deluxe machines and they were fully featured . . . and they were high price top-of-the-line merchandise" (A 575), but even so, what he termed the "price competitive" market included competition between Sears and Oreck (A 576).

Oreck handled the full line of Whirlpool vacuum cleaners under its first distribution contract (PX 3, E1, par. 2) but for the period 1968-1971, Whirlpool limited Oreck to distribution of two models of Whirlpool-made vacuum cleaners (PX 44, E31, par. 2) while Sears handled, under the Kenmore label, a full panoply of different models (A 326-27, 341-42). By 1967 Oreck found it impossible to compete with Sears in its higher priced line and it was forced to shift to sales through direct mail and to institutional supply houses in order to cut out middlemen, reduce costs and otherwise enable Oreck to compete price-wise with Sears

(A 200-01, 309-10). Thereafter, Oreck's sales increased dramatically from 8,384 units in 1967 and 15,610 units in 1968 to a record high of 78,500 units in 1971 (PX 106, E102), and in time Oreck's sales for upright vacuum cleaners actually surpassed Sears in volume (A 426).

As Oreck's mail order campaign began to prove successful and Oreck's sales of upright units approached and then exceeded Sears', the prices charged by Oreck became lower and thus the price competition it offered Sears became more intense (A 200-12, 303-13). Although there were some differences in design and other minor aspects of the Oreck and Sears units, superficially at least, the buying public would have difficulty in distinguishing them (A 87-92; Tr. 901-68). These similarities of appearance and the sinking Oreck prices—as they increasingly reflected the efficiencies of Oreck's mail order distribution—created classic conditions of competition. "Price and competition are so intimately entwined that any discussion of theory must treat them as one." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 392, 76 S. Ct. 994, 1005 (1956).

Thus Oreck had gone into the mail order business, invading the historic preserve of Sears, and it was this new competition in both price and distribution channels which led Whirlpool to terminate Oreck at the end of 1971. In fact, joint retaliatory action by Whirlpool and Sears began as early as 1967, when Whirlpool's John Payne, who was in charge of the Oreck account (A 105, 577, 857-58) told David Oreck not to "rock the boat" and to terminate his mail order business because the "other customer did not like it" (A 207), and Whirlpool Vice President Jack Sparks and Sol Sweet, Director of its Residential and Commercial Products Division (A 767), told David Oreck that selling

by mail order was a "mistake" (A 501, 505). Within a year Whirlpool terminated Oreck's distributorship agreement (A 170) and Payne explained to David Oreck (A 175):

> Dave, I hesitate to tell you this because it could cost me my job, but I think our other customer [Sears] got to the head of the company.

Sears' concern about Oreck's mail order competition also contributed significantly to Whirlpool's termination of Oreck in 1971 when Sid Boyar—who was both a Sears vice president and director and a Whirlpool director (A 335, 828-29)—forwarded an Oreck mail solicitation to Don Ranum of Whirlpool in April of 1971 (A 330). Ranum in turn sent it to Whirlpool President John Platts with this covering note (PX 60, E54):

> . . . [W]e got a letter from Sid Boyar in which he forwarded a letter from "an old friend of Whirlpool" * who had received an Oreck offer and also thought this type of selling gave Whirlpool a bad name.

Still other facts of record show that Whirlpool sought to prevent Oreck from competing with Sears in the mail order business. Whirlpool agreed to create a parcel post package to accommodate a knockdown version of Sears' upright vacuum cleaner (A 610) but refused to create a comparable package satisfying parcel post and UPS requirements for the distribution of Oreck's CVR 2000 and LV 551 models (A 601-02). Payne initially stated that there would be no problem (A 604) and that it was just a matter

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* In its answer to interrogatories Sears identified the "old friend of Whirlpool" as J. M. Barker, "an Honorary Director of Sears" (A 330).

of working it into the next production schedule (A 606), but he later advised Marshall Oreck (A 609):

> [Corporate said] they are not interested in providing you with a carton and it's in your best interest leaving this matter alone. It's sensitive with Corporate* and do not make any changes, leave this matter alone.

In sum, defendants' overall objective was to protect Sears against all forms of Oreck's price competition. It was not, as defendants assert (Brief, p. 2), merely to protect Sears against "price cutters" as that term normally is used, describing "wholesalers or retailers who did not adhere to a schedule of resale prices" set by their supplier. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 40, 80 S. Ct. 503, 510 (1960).

Defendants also seek to mislead this Court when they state that the prices charged for "comparable" units were $18 to $24 for Sears and $46.80 for Oreck (Brief, pp. 4, 9). The $18 and $24 prices referenced by defendants involved special "3 Days" and "2 Days" promotions by Sears' retail outlets in the Chicago area in 1969 (PX 165; not included in the Joint Appendix) and not the prices regularly charged by Sears.

In fact, the prices of these two competitors fell within a much narrower range. Whirlpool President Platts reported to Whirlpool Vice President Sparks in June 1966 that "our average billing price to Oreck [wholesale prices] is now down to $27.81 per unit" or "almost $5.00 less than our average billing price to Sears for the year to date ($32.54)" (PX 45, E39).

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* In context of these facts the jury fairly could infer that what was "sensitive" to "Corporate" was in fact the interests of Sears.

(3) Other Restraints on Oreck's Competition With Sears

The record also shows that beginning in June 1966 Whirlpool and Sears conspired to exclude Oreck from the Canadian market. When David Oreck inquired about Canadian sales (A 131), Whirlpool Sales Manager Don Galloway (PX 26, E15) and John Payne told him that he could not solicit orders for Whirlpool vacuum cleaners in Canada (A 121-22, 125-26), and Sol Sweet—Whirlpool's Director of Commercial Products (A 767)—wrote on Galloway's note of June 3, 1966: "Do not want to get involved at this time with distribution of this product in Canada" (PX 26, E15). A Whirlpool memorandum of June 27, 1966 written by its President Platts shows that Whirlpool's real motive was to prevent Oreck from competing with Sears in Canada (PX 45, E40):

> . . . Suffice it to say that we must maintain our perspective as regards why we were originally interested in this venture—what 20,000 [Oreck] units does or doesn't do for us compared to 550,000 for Sears—how much management attention we can justify for the profit involved, etc.
>
> P.S. Needless to say, we shouldn't consider for a moment authorizing Oreck to operate in Canada.

Whirlpool later stubbornly refused to obtain Canadian Standard Association's ("CSA") approval for Oreck's unit (A 353, 387), a perfunctory matter but necessary for marketing in Canada (A 837), and to make the trivial design changes necessary to meet CSA standards (A 130-33, 151, 154). Product Manager Payne encouraged David Oreck, and Whirlpool's Sweet and J. M. Wooldridge—Whirlpool's

Assistant to the Chairman and President (PX 47, E44)—said they would look into CSA approval (A 152-53), but Whirlpool never submitted the vacuum cleaner for CSA approval (A 131). John Payne admitted that Whirlpool's corporate management (John Steeb, Mr. Payne's superior) instructed him not to make the changes necessary for CSA approval (A 354, 362-63). And in a telegram to David Oreck dated April 15, 1970, Payne expressed regret that "I am unable to obtain a waiver to the current franchise to permit Canadian marketing" (PX 34, E22; A 356-57).

The only possible explanation of Payne's use of "current franchise" on the evidence was that it referred to Sears. Sears marketed vacuum cleaners in Canada through Simpson-Sears Ltd. (A 135, 538-39, 562-64), and Whirlpool easily could have obtained CSA approval for Oreck's units because it already had obtained CSA approval for Sears' close counterparts of the Oreck CVR series (A 134-35). However, when Payne was deposed by Oreck's counsel on July 8, 1974 he tried to repudiate the words "current franchise" found in his telegram to David Oreck. He first testified that his choice of words "was in error" (A 357) and "it's a mistake on my part" (A 359). Later, however, he was forced to admit that he discovered this "mistake" when he met with his counsel during the preceding week (A 362), over four years after the telegram was sent, and that "my counsel* advised me" of the mistake (A 364).

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* The portions of Payne's deposition which were read to the jury made it clear that "counsel" was Whirlpool's trial counsel (A 355-64). Moreover, when Payne "corrected" his deposition testimony some 18 months later (Dep. Tr. 428-30) he tried to repudiate his testimony about the telegram merely by changing from "Yes" to "No" his answer to the following question (Dep. Tr. 370):

> Q. Isn't it a fact, Mr. Payne, that someone told you to say this, if you are asked a question about this phrase "waiver to the current franchise," to say that you mistakenly meant CSA approval? A. Yes.

If there was anything Payne could have said useful to defendants, it would seem that he most surely would have served as defendants' principal trial witness. In any event, it is clear that the credibility of his changed version of the Canadian conspiracy had been completely destroyed during his deposition and that this was a compelling reason for defendants' decision not to call him to the stand despite his presence in the courtroom (Tr. 1648). Defendants' failure to call Payne to the stand shows the frivolity of their present claim that the jury's findings as to conspiracy must stand or fall on plaintiff's version of the conversation between the two Orecks and Payne (Brief, p. A10). Defendants' failure was a highlight of the trial because he was the principal contact between Whirlpool and Oreck as Whirlpool's representative in charge of sales of special products (A 105), and John Steeb, his immediate superior (A 857) admitted that Payne was the man in charge of the Oreck account who dealt more often with Oreck than anyone else in Whirlpool (A 857-58).

Defendants' failure to call Mr. Payne as a trial witness also was a stunning omission because he was the key figure in Whirlpool's efforts to prevent Oreck from competing with Sears in the private label business. Both David and Marshall Oreck testified that several times they asked Payne to make vacuum cleaners for private label customers (A 257-58, 264, 634-35; PX 78, 79, 81, E84-89), that no changes would have been required in models already produced for Oreck (A 262-63, 635, 657-59), and that Payne initially considered honoring these requests (PX 79, E88). For example, in June 1967 Marshall Oreck asked Payne about getting private label manufacture of the AP-18 attachments for Airway Sanitizer of Toledo (A 625-26), and Payne was very enthusiastic and said it would be a

marvelous way to increase business (A 626). Payne said he expected price quotations very shortly (A 626-27) but in early 1968 he told Marshall Oreck that "corporate had decided not to quote on this and not to make a private label for us" (A 629). Later in 1968, when David Oreck asked Payne to make a private label vacuum cleaner (A 259-60), Payne responded (A 263):

> Dave, I want to tell you as a friend, don't rock the boat. We have objections here from our customer [Sears] about giving you private label and if you persist on asking this it's only going to cause you trouble.

Payne rejected later requests for private label manufacture by David Oreck (A 264-65) and by Marshall Oreck (A 635), but Oreck nonetheless persisted (A 636-38) until September 1971 (A 637), when Payne told Marshall Oreck that "another vacuum cleaner customer" [Sears] told Whirlpool that "they are not interested in having another competitor in the vacuum cleaner business" (A 638).

The jury also had before it other facts of record showing that Whirlpool behaved irrationally in terms of its own self-interest, and this circumstance created a strong inference of conspiracy. For example, Whirlpool terminated Oreck's franchise in 1971 even though Oreck's sales totaling 78,000 units that year made 1971 by far its most successful sales year, and even though Whirlpool's witnesses readily admitted at trial that Oreck was "doing a nice job, no question about that" (A 552) and "we had no argument with the amounts he was selling" (A 488). In fact, Whirlpool's irrational economic behavior continued after Oreck's termination. In 1972 Whirlpool stubbornly refused to sell 30,000 Oreck units in inventory (A 298) on a cash

basis at a full unit price of $30 (A 299, 491-92, 495-96, 518, 521-22, 544-46), selling them instead to third parties at $15 per unit (A 546, 555-56) or at a net loss to its stockholders totaling almost $1 million (A 523; PX 103, 104, E99-101).

The jury properly could infer the existence of conspiracy from these and other instances of Whirlpool's business irrationality because such behavior "is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 74 S. Ct. 257, 259 (1954). Competition presupposes that businesses pursue their own self-interest.

(4) Oreck's Exclusion From the Market After 1971

The record is uncontroverted in showing that at its termination on December 31, 1971, Oreck was totally eliminated from selling Whirlpool-manufactured vacuum cleaners, leaving Sears free from the competition of Oreck (A 508; Tr. 656), and that Oreck for a time also was excluded from the entire vacuum cleaner market. As concerns the market for vacuum cleaners at large—which the majority thought was the context in which illegality must be assessed (563 F.2d at 56-58, slip op. at 6054, 6056-58)—we show hereafter that the question of appropriate market is pertinent only on a mistaken premise covering the law of boycott or conspiratorial exclusion (pp. 36-38, *infra*).

Defendants' contention that after 1971 Oreck "readily obtained a new source of supply for vacuum cleaners which it sold with ever increasing success" (Brief, p. 6) has no support in the record. Although we think this matter has nothing to do with the issues of liability, it should be noted that the record references cited by defendants

(A 408-09, 887-89) refer only to David Oreck's testimony about Oreck's longer warranty and post-1971 sales. Moreover, David Oreck testified unequivocally that in terms of market acceptance he was injured by loss of the Whirlpool line (A 425-27, 445-46; Tr. 607-08) and that the loss of good will associated with the Whirlpool product was particularly damaging because the good will had accumulated in large part because of Oreck's own advertising (A 69-72, 211-12, 215-19, 239-43). He also testified that Oreck's new vacuum cleaner was made in West Germany and a new entrant into the market, and it could not overcome the strong customer preference for the widely advertised and reliable Whirlpool unit (A 409). One of Oreck's expert witnesses was Dr. Hyman Ritchin, a well-known antitrust economist, who detailed in his testimony the specific and substantial barriers to Oreck's re-entry into the market after 1971 with a new and different product manufactured abroad (A 662-78, 696-97). If exclusion from a market of vacuum cleaners is a meaningful inquiry, the jury certainly was entitled to accept this testimony by Mr. Oreck and Dr. Ritchin.

In their brief (pp. 5, 8), defendants quote from a mailing describing Oreck as the "World's Largest Seller of Top-Fill Uprights" (DX U, E189), suggesting this shows that Oreck experienced no difficulty in getting a new source of supply after 1971. Unfortunately for defendants, the record does not support that sly suggestion. David Oreck testified that the mailing was made some time after September 1975 (Tr. 536), and it does not, of course, speak to the years immediately following the exclusion. In rejecting defendants' closing argument to this effect (Tr. 1738), the jury must have realized that Oreck's sales of "top fill" units during 1971 and after late 1975 had no bearing upon its exclusion from the market at the end of 1971.

ARGUMENT

POINT I

The conspiratorial termination of a distributor, effected by a manufacturer and the existing competitor of the distributor, constitutes a *per se* violation of Section 1 of the Sherman Act.

A. *The Jury, Upon Abundant Factual Evidence, Correctly Found That the Termination of Oreck Was the Result of Joint Collaborative Action Between Whirlpool and Sears.*

Whirlpool and Sears assert, and the majority embraces, a totally erroneous view of the facts established at trial. The record shows clearly that Whirlpool, at the behest of its major customer, terminated Oreck in order to protect Sears from the burgeoning competitive threat represented by Oreck's increased sales of Whirlpool-manufactured vacuum cleaners. The competitive threat primarily emerged from Oreck's entry into the mail order business, and from the closing of the gap between Orecks' and Sears' pricing. The United States Supreme Court, and also this Court, have continually and without exception held that an appellate tribunal must give the prevailing party in a jury trial "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn," *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409 (1962), and "appellate courts must constantly have in mind that their function is not to decide factual questions *de novo*". *Zenith Radio Corp.* v. *Hazeltine Research. Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969). Unfortunately, the majority ignored these standards and rewrote the record by denuding it of plaintiff's abundant proof, both direct and

inferential, of conspiracy. Indeed, the majority even suggested that proof of conspiracy depended "primarily" on communications with "a salesman for Whirlpool" (563 F.2d at 56, slip op. at 6052). This view of the record was strongly countered by Judge Mansfield (563 F.2d at 64 n.2, slip op. at 6070 n.2).

From 1963 until Oreck's termination on December 31, 1971, both Oreck and Sears competed in the sale of Whirlpool-manufactured vacuum cleaners, Oreck under the Whirlpool trademark and Sears under the Kenmore label. In the first instance, it is plain that during the period 1963-1971 two competitive entities were contemporaneously meeting head on, selling Whirlpool-manufactured vacuums under different trademarks. These machines, while similar and competitive each to the other, were found not to be identical (A 87-92; Tr. 901-86) and hence the conspiratorial elimination of Oreck was a restraint upon interbrand as well as intrabrand competition. Incisively, when Sears caused Whirlpool to terminate the Oreck contract it did not substitute itself for Oreck because Sears did not sell Whirlpool/Oreck vacuum cleaners; rather, at all times it sold the Kenmore line.

For this, and other reasons, the commercial reality of this action has no relationship to the exclusive distributor cases relied upon by Whirlpool and Sears and adopted by the majority as governing law. Whirlpool did *not* remove Oreck as a pre-existing exclusive distributor and replace it with Sears as a substitute to fill the same role for the same product. That much all the unilateral distributorship substitution cases have in common. *See Alpha Distributing Co. of California* v. *Jack Daniels Distillery,* 454 F.2d 442, 452 (9th Cir. 1972); *Elder-Beerman Stores Corp.* v. *Federated*

Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822 (1957), and the other cases cited at page 7 of defendants' brief. This conspiratorial elimination of Oreck, far from representing an innocent change in exclusive distributors, was in fact an elimination of thriving competition of both interbrand and intrabrand nature.

From this fundamental misperception of the record flows the fallacious reliance of defendants and the majority upon the dealer substitution line of cases, and the invocation of inapposite doctrines that have meaning only in respect of the legality of exclusive vertical arrangements—*e.g.*, "resulting foreclosure of market alternatives" (*Elder-Beerman*, 459 F.2d at 146). All of the cases cited by defendants (Brief, p. 7) and by the majority (563 F.2d at 57, slip op. at 6065) recognize the critical distinction between innocent unilateral substitution of exclusive distributors and the conspiratorial termination of existing competition. In connection with these cases, Judge Mansfield correctly recognized that (563 F.2d at 64, slip op. at 6071):

> . . . Indeed, each of the dealer termination cases finding no violation of § 1, including the carefully reasoned opinion in *Hawaiian Oke*, recognized that a *per se* rule would apply to a dealer termination where the manufacturer had the "anti-competitive objective" of excluding "one or more so-called 'discounters' or 'price cutters' ". 416 F.2d at 76. . . .

Furthermore, in *Bay City-Abraham Bros., Inc.* v. *Estee Lauder, Inc.*, 375 F. Supp. 1206 (S.D. N.Y. 1974) the court emphasized the distinction between the mere substitution of one distributor for another and joint collaboration to ter-

minate a competitor by its reference to the following holding in *Bushie* v. *Stenocord Corp.*, 460 F.2d 116, 119-20 (9th Cir. 1972):

> In connection with refusals to deal, the courts have found to be "arrangements restraining trade" such practices as refusals to deal to eliminate price-cutting dealers . . . to keep new competition out of a market . . . or to further strengthen an already dominant market position. . . .
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> . . . *We recognize, of course, that where such a purpose* [to eliminate competition] *appears, an agreement constitutes actionable conspiracy.* (Emphasis added).

Judge Mansfield was, of course, correct in stating (563 F.2d at 62, slip. op. at 6066):

> . . . [I]t is elementary that a combination between a manufacturer and one or more of its customers which has as its sole objective the restraint of another customer's competition through purchase and resale of the manufacturer's product is *per se* illegal. . . .

In *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 82 S. Ct. 486 (1962), defendant argued that it "was merely doing what it had a right to do" (368 U.S. at 473, 82 S. Ct. at 491) under the franchise agreement by invoking a franchise termination clause, but the Court rejected this contention, commenting (368 U.S. at 468-69, 82 S. Ct. at 488-89):

> It may be that [defendant] by independent action could have exercised its granted right to cancel [plaintiff's] affiliation upon six months' notice and independently purchased its own outlet. . . . However, if such

> a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade . . . then such conduct might well run afoul of the Sherman Law. . . .

The foregoing vital distinction between mere substitution and conspiratorial termination springs from recognized economic realities. In the traditional exclusive distributorship relationship the limitations on the manufacturer's economic freedom are self-imposed*: he surrenders his right to sell or have others sell in the exclusive territory. He does not act, as here, as the conspiratorial surrogate for a competing distributor such as Sears.

This is the rationale of the exclusive distributor cases and judicial references to the rule of "virtual *per se* legality," *e.g.*, *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), or "nothing more than vertical confinement," *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856 (1967) cited by appellants (Brief, p. 6) and by the majority (563 F.2d at 54, slip op. at 6055-56). It is also the essence of the holding of *Elder-Beerman*, cited by defendants (Brief, p. 6), to the effect that the rule of reason generally insulates the granting of exclusive rights unless "there is a resulting foreclosure of market alternatives." But when, as here, the manufacturer (Whirlpool)

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* "The point is very simple: If I set up a dealer in Baltimore and I do not want any more dealers in Baltimore, the only way I can make that stick is to tell the Washington dealer that he cannot set up an establishment in Baltimore." Donald S. Turner, former Assistant Attorney General (Antitrust Division), *Antitrust Law Symposium* 64 (New York State Bar Association 1968).

acts contrary to its own economic interests and, at the behest of its major customer (Sears) which has begun to feel the sting of a competitor's increased sales, effectuates a conspiratorial stamping out of that competitor, there is no dispute in the authorities that the *per se* rule comes into full play.

The court said in *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co. of Kansas*, 353 F.2d 618, 622 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966):

> In the case at bar the intent of the conspiracy was to eliminate the competitor predominant in the area. . . . *Such elimination destroys rather than maintains competition, is an unreasonable restraint on trade, and violates the* [Sherman Act] . . . (Emphasis added).

B. *The Termination of Oreck Represents a Boycott Condemned by* Klor's *and* General Motors *as a* Per Se *Violation of Section 1 of the Sherman Act.*

It has been demonstrated that a conspiratorial termination of Oreck in order to advance the competitive interests of Sears has been proved and not a mere substitution of exclusive distributors. Oreck's continuing competition with Sears in the sale of Whirlpool-manufactured vacuum cleaners was eradicated by the simple device of withholding Oreck's access to merchandise needed for its economic survival. This occurred when Oreck's increased mail order sales became a major competitive threat to Sears.* The

* Oreck's continuing and growing threat to Sears amounted to the economic concept sometimes called the "edge effect." As the Oreck price neared the Sears price it operated as a ceiling against a Sears increase. *See* 1 Fox & Fox, *Corporate Acquisitions and Mergers*, § 11.02[2] at 11-7 (Matthew Bender 1977); *United States* v. *Penn-Olin Chemical Company*, 378 U.S. 158, 173-74, 84 S. Ct. 1710, 1718-19 (1964).

secret of Oreck's growing success became a vigorous mail order campaign offering prices significantly below the level previously established by Oreck—and below levels which Sears regarded as safely high (pp. 5-12, *supra*). In short, this case represents the destruction of a "discounter"—from higher price levels—by the withdrawal of his access to required goods and services.

Thus, as recognized by Judge Mansfield (563 F.2d at 59, slip. op. at 6060), this case fits precisely the mold of a "classic conspiracy in the restraint of trade: joint collaborative action . . . to eliminate a [competitor] by terminating business dealings." *United States* v. *General Motors Corp.*, 384 U.S. 127, 140, 86 S. Ct. 1321, 1328-29 (1966). *General Motors* makes unmistakably clear that "elimination, by joint collaborative action, of a discounter from access to the market is a *per se* violation of the [Sherman Act]" (384 U.S. at 145, 86 S. Ct. at 1330). The well-recognized purpose of the *per se* doctrine, relative to certain hard-core violations, is to obviate the need for broad market inquiries and to prevent the trier of fact from swamping itself in a morass of sweeping economic considerations and value judgments all in the aid of a showing of economic justification, when judicial experience has shown that the practices are not to be justified. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126 (1972); *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 78 S. Ct. 514 (1958).

Since the rule of reason (where applicable) calls for exactly this type of comprehensive market analysis, it has no place in respect of a boycott designed to eliminate the price competition of even a single trader, as the United States Supreme Court clearly articulated in *Klor's, Inc.*

v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13, 79 S. Ct. 705, 709-10 (1959):

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances. . . .
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> . . . As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. . . .

The phrase "group boycott" seems to have confused the majority. It suggests a cluster of boycotters with perhaps more than a few entities enmeshed in the boycott. "Group," however, has no such meaning. No case has ascribed numerosity to it and the dictate of the Sherman Act simply calls for multiple actors—two or more. We suggest that "boycott" means nothing more than concerted refusal. The latter is the very holding in *General Motors*.

Also, nothing depends on the metaphors of "horizontal" and "vertical," although Judge Anderson turned the *per se* rule into one requiring "a horizontal conspiracy" (563 F.2d at 58, slip. op. at 6058).

It would be difficult to find a boycott of goods involving only one of the two levels. "Horizontal" competitors on the same distributive level could combine or conspire with each other all day long, but their conspiracies would become mere fantasies if they were unable to cause the supplier to refuse to supply the victim with the goods he wanted to buy.

Thus, in *Associated Press* v. *United States,* 326 U.S. 1, 65 S.Ct. 1416 (1945), the competing newspapers had to have the cooperation of the news service in order to prevent the news from reaching the victim newspaper. And in *Fashion Originators' Guild of America, Inc.* v. *F.T.C.,* 312 U.S. 457, 61 S.Ct. 703 (1941), the competing dress manufacturers could not affect the dress manufacturer-victim without causing the yarn and cloth manufacturers to refuse to supply the victim. In *General Motors,* the authorized Chevrolet dealers could have held each other's hands and cried out in unison "for shame" to the price-discounting victims, but all of their utterances would be meaningless without the threat coming from General Motors that it would cut off the supplies of price discounters reselling Chevrolets. In *Klor's* some of the suppliers, at the instance of a single competitive store (Broadway-Hale), cut off some of the products which the discounters wanted to buy and resell.

So it is in almost every case of boycott that we find both "vertical" and "horizontal" conspirators, and any requirement for multiple actors on the "horizontal" level of the victim is nothing more than an absurdity. The vitality of the boycott comes from the refusal of the supplier to supply goods to the victim and not from the multiplicity of boycotters.

Judge Mansfield certainly is pointing to economic reality when he relates that Sears, which operates a mail order business and "some 2800 stores and sales offices selling vacuums" (Sears' Ans. to Interrogs. 1-C and 2 of Jan. 31, 1973), is "the equivalent of many Whirlpool distributors" on the same horizontal plane with Oreck (563 F.2d at 66, slip op. at 6074). But, we submit, nothing depends on this in depth analysis since the number of conspirators "has no legal significance" (563 F.2d at 66, slip op. at 6074). "A

conspiracy under the Sherman Act may embrace two or more individuals or corporations." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247, 60 S.Ct. 811, 855 (1940); *South-East Coal Co.* v. *Consolidated Coal Co.*, 434 F.2d 767, 774 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

The difference between Judges Anderson and Mansfield concerning this matter is not to be resolved by such diversions as whether or not the courts will accept the concept of an intra-corporate conspiracy involving different departments or branches of a single company. Such delicacies need only be looked into when necessary to ascertain whether an antitrust claim contains the required two or more actors. It is not necessary, here, to atomize Sears in order to find these actors. It is enough that we have Sears and Whirlpool, separate entities, although the former was so receptive to the wishes of the latter that it acted against its own self interest in order to confer upon Sears freedom from the competition of Oreck. The majority, however, states (563 F.2d at 58, slip op. at 6058) (footnote omitted):

> . . . Had Sears joined with other retailers of Whirlpool vacuum cleaners to drive Oreck out of the vacuum cleaner market, this court would have been presented with a totally different situation, but Sears did not do so and, therefore, *Klors* is not applicable. Because Sears is a large company presumably selling a large number of vacuum cleaners does not, *ipso facto*, convert this case into a horizontal conspiracy warranting *per se* treatment.

By ignoring the facts and the holdings of both *General Motors* and *Klor's*, defendants have led the majority into an unfortunate muddling of these pivotal cases. As stated above as to *General Motors*, the manufacturer (Gen-

eral Motors) was a vital cog in a conspiracy between itself and the Chevrolet dealers threatened by a price discounter, and nothing there suggests that the United States Supreme Court's holding would have been different had only one Chevrolet dealer been involved in a vertical conspiracy with General Motors. By the same token *Klor's*, too, involves a vertical element, for the boycott could not possibly have succeeded without the vertical conspiratorial efforts of the manufacturers. Nor is there any suggestion whatsoever in *Klor's* that a host of actors on one or more distributive levels is required. The majority of the panel has misstated the facts. In *Klor's*, as in the case at bar, there was only a single conspirator on the same level. Accordingly, Judge Mansfield rightly says (563 F.2d at 63, 66, slip op. at 6068, 6074):

> . . . [S]uch a combination by agreement to restrain price competition or through refusal to deal with a customer is *per se* illegal whether it is horizontal, vertical or embraces participants from both levels . . .
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> . . . A combination to restrain intrabrand price competition cannot be condoned simply because it consists solely of the manufacturer of the product and its only distributor, a huge merchandising chain, without participation by a second distributor. The law looks to substance, not form, and condemns as *per se* illegal any combination or conspiracy of 2 or more persons to restrain price competition or to eliminate a competitor.*

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* Defendants savagely distort Judge Mansfield's point about Sears' economic muscle, making it seem a revolutionary doctrine of intra-corporate conspiracy (Brief, p. 13). The majority, too, by citing the supposed horrifics of determining "in future cases"

Furthermore, Oreck is not required to show "public injury" resulting from its conspiratorial termination by Sears and Whirlpool. Not only was such a requirement rejected by the United States Supreme Court in *Klor's*, and also in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke, Co.*, 364 U.S. 656, 81 S. Ct. 365 (1961), but this Court itself has done so. *See, e.g., Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976), relating to the delivery of a single newspaper (and relying upon *General Motors*), and *Syracuse Broadcasting Corp.* v. *Newhouse*, 295 F.2d 269 (2d Cir. 1961). *See also Fleischmann Distilling Corp.* v. *Distillers Co., Ltd.*, 395 F. Supp. 221, 228 (S.D. N.Y. 1975), stating that "cases in this circuit have held that an allegation of public injury is not essential in *any* claim for relief under Section 1 of the Sherman Act" (emphasis added), and Judge Metzner's ruling as follows in *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310, 314 (S.D.N.Y. 1961):

> . . . [U]nder any alleged violation of Section 1 of the Sherman Act, the plaintiff no longer need show that the public has been deprived of goods or that it had to pay a higher price for them or accept an inferior substitute. The result is that a small business man is protected to the same extent as a larger one.

It follows from the *Klor's* line of cases that this Court must reject the arguments of defendants (Brief, pp. 7-8) relative to "foreclosure of market alternatives," the number of companies manufacturing vacuum cleaners, and the

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just what constitutes a "big" company (563 F.2d at 48, n.5, slip op. at 6058, n.5), seems to misapprehend Judge Mansfield's simple and well-established proposition that two actors are sufficient to make out a Sherman Act boycott conspiracy.

fact that Oreck eventually found a new (but less satisfactory) supplier, together with the majority's proclaimed belief that no violation of Section 1 of the Sherman Act can be established unless the entire "vacuum cleaner industry in the United States and/or Canada" was restrained by Oreck's termination (563 F.2d at 58, slip op. at 6057-58).

The boycott cases do not depend on a market definition. A boycott may exclude a businessman from all or part of a market. It is the *effect* on him—and not on the market—which is condemned by *Klor's* and subsequent cases. See pp. 36-38, *infra*. This Court should also reject the majority's mistaken treatment of *Klor's* and the long established boycott doctrine as not being applicable on the ground that this case is merely "an exclusive distributorship controversy" (563 F.2d at 58, slip. op. at 6058).

The change to mail order distribution, enabling Oreck to lower its price so that it came nearer to the Sears price, proved to be the precipitant which caused Sears to insure the removal of Oreck price competition. This analysis is made by Judge Mansfield in his dissent (563 F.2d at 60, slip op. at 6061). Nothing turns on the fact that Judge Mansfield's opinion may be read to suggest—perhaps mistakenly on the state of the record—that the Oreck price fell below the Sears price. If price competition exists at all, it means that one company necessarily is charging less than another, but that the two have significant impact on each other.* The defendants in their brief have chosen

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* The precise price charged by each competitor is not what governs. We have already noted that in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 392, 76 S. Ct. 994, 1005 (1956) the Supreme Court said that "price and competition are so intimately entwined that any discussion of theory must treat them as one." It also said that "the selling price between commodities

to pick extremely low Sears' "2 days" and "3 days" prices advertised in newspapers in 1969 (see pp. 10-11, *supra*), pointing to them as if they were the regular prices at which Kenmore vacuum cleaners were sold, and also have used in contrast to them a 1971 Oreck price (Brief, pp. 4, 9). We have seen above that the prices, even as casually shown on the record, moved much closer to each other, with the early higher Oreck price plummeting toward Sears' level.* The significant fact is that mail order distribution, as Oreck testified, made it possible for him to price the vacuum cleaner more competitively in comparison with Sears (A 200-12, 303-13), and that rather than face this new price and distributive competition, Sears caused Whirlpool to terminate Oreck. The various efforts made by Whirlpool to fend off price competition offered Sears by Oreck, although not amounting to an agreement to fix prices, surely represented an agreed upon tampering with the price structure, equally a *per se* violation. *Ethyl Gas* v. *United States,* 309 U.S. 436, 458, 60 S. Ct. 618, 626 (1940); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221-224, 60 S. Ct. 811, 843-44 (1940). These concerted acts tended to show that the

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with similar uses and different characteristics may vary, so that the cheaper product can drive out the more expensive. Or, the superior quality of higher priced articles may make dominant the more desirable" (351 U.S. at 396, 76 S. Ct. at 1008).

* The defendants' statements about the price are demonstrated to be misleading by the fact that the President of Whirlpool, John Platts, in effect warned that Oreck was lowering its price and Whirlpool must protect the Sears price since the average wholesale billing from Whirlpool to Sears was $32.54 (PX 45, E 39). This statement undercuts defendants' effort to present Sears' price as if the "2 Day Sales" advertisements from $16 to $24 were representative. The closeness of the Sears/Oreck prices is indicated by a proposed Oreck sale to Canada blocked by Whirlpool. The wholesale price on that transaction would have been $32.54 (*See* PX 45, E 39 and pp. 8, 11-14, *supra.*)

purpose of Whirlpool in cutting off Oreck was contaminated (563 F.2d at 61, slip op. at 6064).

Defendants' assertion that "the contention" that Oreck was disciplined for price cutting was thrust into the case for the first time by the "dissenting opinion" (Brief, p. 3) is totally irresponsible. Some of the numerous references to the elimination of Oreck and other disciplining of it to avoid Oreck's price competition with Sears may be found in the brief for plaintiff-appellee on this appeal at pp. 8-9, 30, 33, 35, 38. The first point made in our Counter-Statement of the Facts on appeal was that Oreck's price competition with Sears was restrained, pp. 9-18. At page 30 of our principal brief, we summarize by saying:

> . . . Moreover, as shown above (pp. 9-18, *supra*), the elimination of Oreck from the marketplace was provoked in large measure because Oreck's mail order techniques created serious price competition for Sears. It is this competitive threat to Sears which is the real meaning of defendants' repeated assertions about Oreck's "getting back on the track" (Brief 5-8, 20). . . .

C. *The Majority Improperly Relied Upon Continental TV, Inc.* v. *GTE Sylvania Inc.*

The majority, working with the operative (and erroneous) premise that the case at bar is merely "an exclusive distributorship controversy" (563 F.2d at 58, slip op. at 6058), felt its conclusion was "given additional weight by the Supreme Court's recent overruling of the *per se* approach to vertical location restrictions" in *Continental TV, Inc* v. *GTE Sylvania Inc.*, —— U.S. ——, 97 S. Ct. 2549 (1977) (563 F.2d at 57-58, slip op. at 6056). *GTE Sylvania* addressed itself to the right of a manufacturer to establish, for legitimate business objectives, certain fixed territorial

locations for its franchised distributors in order to heighten interbrand competition, after having suffered the consequences of a drastically oversaturated and indiscriminate system of retail outlets. Viewing GTE Sylvania's system as analogous to an exclusive distributorship, the Supreme Court held that—*in this context*—a *Schwinn* blanket *per se* prohibition against vertical territorial restrictions should be loosened and recourse had to the preexisting rule of reason. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87, S. Ct. 1856 (1967). *GTE Sylvania,* in short, involved restrictions which were ancillary to a legitimate business purpose and not the hard core "naked restraints", designed solely to destroy competition, which have long been—and remain—the object of classic *per se* treatment.*

The ancillary restraints upheld in *GTE Sylvania* involved restrictions imposed upon dealers by a franchisor, in the exercise of its self-interest and business judgment, in order to achieve effective distribution. Whirlpool, in the instant case, acted for radically different reasons—*i.e.,* on behalf of Sears, to restrain and finally stamp out Oreck's competition. Judge Mansfield's appraisal of *GTE Sylvania* is thus above reproach (563 F.2d at 65, slip op. at 6073-74):

> Similarly, the Supreme Court's recent decision in *Continental TV, Inc.* v. *GTE Sylvania Inc.*, —— U.S. ——, 97 S. Ct. 2549, 53 L.Ed.2d 568 (1977), relied on by the majority, has no application to this case. Although the Court overruled a portion of *United States* v. *Arnold Schwinn & Co.*, not involved here, it did not

* The distinction between "naked" and "ancillary" restraint has been recognized since the earliest decisions of the United States Supreme Court applying the Sherman Act. See, *e.g., United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

change any of the foregoing principles regarding price restraints. On the contrary, it reaffirmed them, restricting its application of the "rule of reason" to exclude vertically-imposed price restraints, —— U.S. ——, 95 S. Ct. 2549 n.18, and *General Motors*-type conspiracies. ——— U.S. ——, 97 S. Ct. 2549 n.28.

The case at bar is not a challenge to a set of vertical restraints imposed to establish a distribution or franchise system. Nor is this the case of a manufacturer restricting territories or customers in connection with distribution of its branded product in order to stimulate competition with other brands. It involves rather the successful efforts of the principal customer, indeed the dominant mail order retailer, to destroy the only other competitor for its manufacturer's product. In *GTE Sylvania,* Justice Powell noted that in the normal franchise or distribution situation, the manufacturer sought to "reduce but not to eliminate competition among . . . retailers" (97 S. Ct. at 2556).

Justification for vertical restraint under *GTE Sylvania* rests on the manufacturer's right to build up its own good will and promote its trademarked product. The restraints here did not have that goal; they had the opposite purpose. Whirlpool favored the Sears "Kenmore" brand (Tr. 1394-95) and destroyed its own. The termination of the sole distributor of its own brand barred Whirlpool from invoking any innocent *GTE Sylvania* justification. Justice Powell was concerned only with non-price vertical restrictions, saying that the others are "firmly" *per se* (97 S. Ct. at 2558 n.18).

Whirlpool's unwillingness to assist Oreck to service and repair its own trademarked vacuum cleaners demonstrates

that its intent in the termination had nothing to do with maintenance of good will. In short, where a manufacturer agreeing with the demands of a giant private label customer sacrifices the only distributor of its own brand, the situation bears absolutely no resemblance to the vertical restrictions to be tested under the rule of reason in *GTE Sylvania*. *See Vertical Restrictions Limiting Intrabrand Competition* 45-46, 53, 57-71 (ABA Antitrust Section, Monograph No. 2, 1977).

The same grounds distinguish this case from *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), and *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957). The exclusive distributorship granted in each of these cases to a small dealer permitted a large manufacturer to protect its trademark and good will as part of the distribution scheme for its brand of automobiles.

D. *The Majority Applied to Section 1 Claims Inapplicable Market Tests Imported From Other Antitrust Prohibitions.*

We respectfully request that the Court consider the fuller discussion of the matter found on pages 6 to 12 of our Petition for Rehearing. The majority of the panel premised that violation of Section 1 of the Sherman Act, on the facts before the jury, required proof of an unreasonable economic effect in the vacuum cleaner market in the United States and/or Canada (563 F.2d at 56, slip op. at 6054), thus mistakenly importing into Section 1 a test similar to that found in Section 2 monopoly cases and, in somewhat different form, in Clayton Section 7 merger cases. Section 1 refers to "restraint of trade or commerce among

the several States, or with foreign nations." In an unbroken line of cases beginning with *W. W. Montague & Co.* v. *Lowry*, 193 U.S. 38, 46, 24 S. Ct. 307, 309 (1904), the Supreme Court has held that such restraints are not circumscribed by size. It stated in *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225-26, 67 S. Ct. 1560, 1564 (1947):

> . . . Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected. . . . Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. . . .

The majority's views on product market also conflict with uniform Supreme Court holdings that exclusion from *only* a portion of the market suffices to establish an illegal *per se* boycott. In the strikingly apposite case, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705 (1959), as discussed above, a small retailer in electrical appliances was boycotted from access to some appliances at the instance of a competitive retailer (359 U.S. at 213, 79 S. Ct. at 710). *See also Silver* v. *New York Stock Exchange*, 373 U.S. 341, 348 n.5, 83 S. Ct. 1246, 1252 n.5 (1963), where the service of private stock wire connections was barred to plaintiff. Similar results were reached in *Associated Press* v. *United States*, 326 U.S. 1, 18, 65 S. Ct. 1416, 1423-24 (1945), and *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, 44, 51 S. Ct. 42, 45 (1930).

The *en banc* panel is urged to reestablish the *General Motors* doctrine in this Circuit unencrusted with the limitations imposed by the majority to the effect that the boycott must operate in a market not limited to Chevrolets

but including all makes of automobiles. *General Motors* was followed in *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976), which dealt with the delivery of a single newspaper (the *Daily News*) under circumstances where franchised route dealers wished to prevent independents from competing with them (522 F.2d at 1256). In affirming that defendants violated Section 1, this Court held via Judge Mansfield (522 F.2d at 1256):

> The News' conduct, undertaken pursuant to an agreement with the franchise dealers and for the purpose of restricting the access of terminated independents to the News, amounts to an unlawful conspiracy in violation of § 1 of the Sherman Act and is remarkably similar to that condemned by the Supreme Court in *United States* v. *General Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321, 16 L.Ed.2d 415 (1966). . . .

In *Bowen* this Court found the conspiracy to violate Section 1 of the Sherman Act illegal *per se*, without analysis of the effect on any "market" for home delivery of the *Daily News* handled separately from all other newspapers and magazines. In contrast, the Sherman Act Section 2 claim of conspiracy to monopolize trade in the *Daily News*—requiring proof of an appropriate market—properly was dismissed by this Court.

POINT II

The majority misapplied the "plain error" doctrine in holding that three jury instructions were reversible as "plain error."

The majority held that these jury instructions "constitute plain error which make necessary a reversal" of the judgment below (563 F.2d at 58, slip op. at 6057),

> [First] "As to the meaning of the term 'restraint of trade,' you are instructed that this general term applies only to unreasonable restraints and not to all possible restraints of trade. Not all restraints of trade are reasonable. All business affects trade in some way" (A 921).
>
> [Second] "*The violations alleged by plaintiff are,* if you credit them, *unreasonable restraints of trade.* If you do not credit them, Whirlpool's conduct was not an unreasonable restraint of trade. (Emphasis supplied.)" (A 921-22).
>
> [Third] "[I]f you find there was such an agreement [between Whirlpool & Sears 'to exclude Oreck from a market in vacuum cleaners or Whirlpool vacuum cleaners anywhere'], then you should go on to consider damages, if any, flowing from it." (A 925).

We submit that there is no error in the given charges (annexed in full context to our Petition for Rehearing) but whether or not any error existed, the "plain error" doctrine may not be applied to the facts of this case.

The record shows that defendants requested the *first* instruction verbatim (Defendants' Instruction No. 10), and

defendants requested an instruction substantially identical to the *third* instruction (Defendants' Instruction No. 20). Accordingly, any error in the first or third charge is "invited error" as to which defendants cannot complain. Wright & Miller, *Federal Practice and Procedure,* ¶2558 at 675. The law is well settled in this Circuit that "[w]here an attorney has requested a charge from the Court, and such charge has been given without exception by him, he cannot thereafter object to it and ask to have the verdict set aside or amended." *Gardner* v. *Darling Stores Corporation,* 138 F. Supp. 160, 161-62 (S.D. N.Y. 1956) (footnote omitted), *aff'd,* 242 F.2d 3, 7 (2d Cir. 1957); *Scott* v. *Central Commercial Committee,* 272 F.2d 781, 782-83 (2d Cir. 1959) (L. Hand, J.), *cert. denied,* 363 U.S. 806 (1960); *see also Maxwell Land Grant Co.* v. *Dawson,* 151 U.S. 586, 606, 14 S. Ct. 458, 464 (1894); *Herman* v. *Hess Oil Virgin Islands Corp.,* 524 F.2d 767, 772 (3d Cir. 1975) ("Thus, if there was any error at all, it was 'invited error' and cannot now be a basis for reversal." (footnote omitted).

The record also shows that defendants actually endorsed the *second* instruction in a robing room conference with the Court (Tr. 1660)* and subsequently failed to make

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* The following colloquy took place in respect of the second jury instruction as Judge Mansfield noted (563 F.2d at 63, slip op. at 6069):

> The Court: I understand that, but it seems to me that if the jury were to conclude that Sears and Whirlpool had conspired to terminate Oreck to rid Sears of a competitor, they have gone all the farther that they need to go.
>
> Mr. Turoff [Whirlpool's counsel]: I see now your Honor's argument. I think what you are saying is that *if the jury finds that we had a conspiracy for the purpose of getting rid of Oreck, that is an unreasonable restraint of trade. That is, I think, a correct statement of the law.* (Tr. 1660) (Emphasis added).

timely objection to it even though after the Court charged the jury the trial judge presented the very instruction to counsel for comment out of the hearing of the jury (A 952-53).

Fed.R. Civ. P. Rule 51 provides in pertinent part that:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This Court has repeatedly held that "[t]he purpose of this salutary rule [Rule 51] is to expedite the administration of justice by insuring that the trial judge is informed of possible errors so that he may have an opportunity to reconsider his charge, and, if necessary, to correct it." *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 234 F.2d 253, 259 (2d Cir. 1956) (footnote omitted); *see also Pierce Consulting Engineering Co.* v. *City of Burlington, Vt.*, 221 F.2d 607, 609 (2d Cir. 1955).

The instructions in question also are entirely proper under the general rule that a jury charge must be taken as a whole, *Norfleet* v. *Isthmanian Lines, Inc.*, 355 F.2d 359, 362 (2d Cir. 1966); *Oliveras* v. *United States Lines Company*, 318 F.2d 890 (2d Cir. 1963), because the jury was instructed in meticulous detail about the assessment of all of the evidence concerning the alleged conspiracy to restrain trade (A 905-45, Tr. 1822-62). The portion encompassing the three instructions (Tr. 1838-42, 1960), properly include the instruction that "my instructions to you are to be taken as a whole, as an entirety" (Tr. 1860).

POINT III

The jury's damage award of $750,000 should be sustained.

The majority remanded the case for retrial without expressing an "opinion as to the correctness of those portions of the trial court's jury instruction dealing with the formulation of damages" (563 F.2d at 59, slip op. at 6060).

There is no necessity for the full panel to review the damage award. The reasoning of Judge Mansfield in this regard is sound and now should be followed by the full Court (563 F.2d at 66 n.4, slip op. at 6075 n.4):

> I would also find that Oreck's proof of damages was sufficient to meet its burden of proof and to support the jury's verdict since "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L.Ed.2d 129 (1969), and that in the absence of precise damage calculations "the wrongdoer should bear the risk of uncertainty that his own conduct has created." *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 565 (2d Cir. 1970). Here plaintiff's evidence of profit structure and sales performance over the years prior to termination and its projections by an expert witness as to future performance, clearly afforded the jury "a reasonable basis of computation." *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S. Ct. 400, 71 L.Ed. 684 (1929).

Plaintiff fully covered all important questions relating to damages in its initial answering brief dated May 2, 1977, at pages 38 to 49.

CONCLUSION

For the reasons given above—primarily because the majority of the panel has failed to follow established boycott doctrine, has imported into the enforcement of Section 1 inappropriate market considerations, and has substituted its judgment for that of the jury as to the facts proved at trial—we respectfully request that the full Court affirm the decision of Judge Owen denying the motion made by the defendants for judgment notwithstanding the verdict or for a new trial.

Dated: New York, New York
February 2, 1978

Respectfully submitted,

LAW FIRM OF MALCOLM A. HOFFMANN
Attorneys for Plaintiff-Appellee
Oreck Corporation
12 East 41st Street
New York, New York 10017
(212) 685-0535

MALCOLM A. HOFFMANN
EDWARD A. WOOLLEY
ROBERT W. BIGGAR
ROBERT C. AGEE
BERNARD ZUCKER
CRAIG SCHILLER
Of Counsel

February 2, 1978

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Norman Friedman , being duly sworn, deposes and says, that on the 2nd day of February 19 78, ~~at~~xxxxx~~at~~xxxx

~~M~~. he served the annexed Defendants' Joint Reply Brief in RE: Oreck Corporation v. Whirlpool Corp. et al.

upon 1. Michae R. Turoff, Esq. c/o Arnstein, Gluck, Weitzenfeld & Minow
2. Charles A. Tausche
Esq(s)., Attorney(s)

for Defendants-Appellants

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that being the address designated in the last papers served herein by the said attorney.

Norman Friedman

Sworn to before me this 2nd
day of February 19 78

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
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